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PUBLIC SERVICE CORPORATIONS: WATER COMPANIES—PRIORITY OF SERVICE—In the regions of California which are dependent upon adequate irrigation for farming, the water shortage of the season of 1920 presented a difficult question as to the manner in which available supplies should be distributed. As a public service corporation, an irrigation company is bound of course to serve without discrimination. This principle, so well stated some few years ago,¹ is now embodied in a statute² which has provided that, as between consumers in times of shortage, there shall be no preference or priorities. The available water must be pro-rated. This rule seems to be preferable to that followed in some western states,³ giving priority to the earlier customers.

The application of this act was considered in *Butte County Water Users' Association v. Railroad Commission*.⁴ The company there concerned, before January, 1920, had made contracts to serve 14,400 additional acres of land. In view of the impending shortage, the older consumers feared that there would not be a sufficient supply to meet their own needs if this additional acreage was supplied, and asked the Railroad Commission for an order directing the company to serve them first to the full amount of their requirements. The refusal of the Commission to make such order was sustained on appeal. The court held the owners of the additional acreage to be consumers and, therefore, entitled to the benefit of the act. It said,⁵ "The relation of public utility company and consumers was established as soon as the company came under obligation to serve and the owners came under obligation to take," by reason of the contracts made prior to January, 1920. Actual delivery of

highest court in Louisiana (State v. Brooks-Scanlon Ry. Co., supra, n. 12), and the railroad was ordered to continue service. The commission had refused to act up to that time because it thought it had no jurisdiction. Following this decision, it issued an order directing the company to continue and file a new schedule of transportation which it could operate at a profit. This the company refused to do, and the case was carried to the Supreme Court of the United States on the legality of the Commission's order. As the court pointed out, it was futile then to say that the petitioner could not object because it had not applied to the commission, for the commission voluntarily had taken jurisdiction and made its order.

¹ Leavitt v. Lassen Irrigation Company (1909) 157 Cal. 82, 106 Pac. 404. See also Wiel, Water Rights in the Western States (3d ed.) §§ 1283, 1284.

² Act of April 25, 1913, Cal. Stats. of 1913, p. 81, § 6; Deering's Gen. Laws of Cal. Act. 4348a.

³ Some states regard the irrigator as the appropriator of the water rights to the extent of his use, making the distributing company the mere agent of all users in conducting the water to them. In those states, logically following out this appropriation doctrine, priority is given to those consumers who were the prior appropriators. Wiel, Water Rights in the Western States, § 1284. Kinney on Irrigation, § 1500. Farmers etc. Co. v. Southworth (1903) 32 Colo. 111, 114, 75 Pac. 415. For a brief discussion of advantages and disadvantages of these doctrines as matters of policy, see "The Relation Existing Between Irrigation Water Users and Distributing Companies," K. L. Blanchard, 7 California Law Review, 390.

⁴ (Feb. 28, 1921) 61 Cal. Dec. 316.

⁵ 61 Cal. Dec. 316, 322.

water was not necessary to complete the relation. The distributing company, therefore, has the privilege of taking on new consumers on its own initiative. It is, indeed, the duty of the company so to do when new consumers apply for service.⁶ The court could find nothing in the statute prohibiting such action without the prior consent of the Commission. At the same time, however, a limit is placed upon the acquisition of new business, namely—not "injuriously [to] withdraw the supply wholly or in part from those who heretofore have been served by such public utility."⁷

This rule has been recognized independently of statute for some time.⁸ But just how far may a distributing company go in supplying new irrigators? Is the supply factor in the problem the low mark established in years of drought or the carrying capacity of the distributing system, or the average yearly flow? Years of drought are not frequent. If the low mark set in those years were adopted, the courts point out that: "It would virtually destroy the irrigability for anything but annual crops, of large amounts of land, when by temporary pro-rated diminution of waters in years of drought, such years could be endured without permanent injury or too great loss."⁹ The system's carrying capacity, on the other hand, cannot be made the standard, as it may never be attained with available supplies.¹⁰ The Railroad Commission here adopted as the limit the normal flow averaged over a period of years.¹¹ But, as the court showed this does not protect present consumers against the years in which the supply falls somewhat below the average flow, and it recommends, therefore, allowing a factor of safety in

⁶ *Supra*, n. 1.

⁷ *Supra*, n. 2, § 5. *Mordecai v. Madera Canal & Irrig. Co.* (1913) 3 Cal. R. R. Com. Dec. 985; *Long v. Atwood* (1914) 4 Cal. R. R. Com. Dec. 34; *Whitaker v. Snowball-Sullivan Co.* (1914) 4 Cal. R. R. Com. Dec. 977; *Ferrasci v. Empire Water Co.* (1915) 6 Cal. R. R. Com. Dec. 309.

⁸ *Wiel, Water Rights in the Western States* (3d ed.) § 128; *Kinney on Irrigation* (2d ed.) § 1500. *Souther v. San Diego Flume Co.* (1903) 121 Fed. 347; *First Trust & Sav. Bank v. Bitter Root Valley Irrig. Co.* (1918) 251 Fed. 320; *Gould v. Maricopa Canal Co.* (1904) 8 Ariz. 429, 76 Pac. 598; *Bank of Cal. v. Fresno Canal & Irrig. Co.* (1878) 53 Cal. 201; *Merrill v. Southside Irrigation Co.* (1896) 112 Cal. 426, 44 Pac. 720, *Leavitt v. Lassen Irrig. Co.*, *supra*, n. 1; *Cozzens v. North Fork Ditch Co.* (1905) 2 Cal. App. 404, 84 Pac. 342; *McDermont v. Anaheim Union Water Co.* (1899) 124 Cal. 112, 56 Pac. 779; *Wyatt v. Larimer & W. Irrig. Co.* (1893) 18 Colo. 298, 33 Pac. 144; *Blakely v. Ft. Lyon Canal Co.* (1903) 31 Colo. 224, 73 Pac. 249; *Brown v. Farmer's H. L. Canal Co.* 26 Colo. 66, 56 Pac. 183; *Gerber v. Nampa & Meridian Irrig. Dist.* (1908) 16 Idaho 1, 100 Pac. 80.

⁹ *Cf.* "The Relation Existing Between Irrigation Water Users and Distributing Companies," *supra*, n. 3. See *Security Investment Co. v. Palermo Land & Water Co.* (1915) 7 Cal. R. R. Com. Dec. 180.

¹⁰ In *Gould v. Maricopa Canal Co.* and *Gerber v. Nampa & Meridian Irrig. Dist.*, *supra*, n. 8, capacity was stated to be the limit, but this precise point was not involved, more than capacity having been used. In *Wyatt v. Larimer & W. Irrig. Co.* *supra*, n. 8, physical capacity was rejected as test of "capacity."

¹¹ *Blakely v. Ft. Lyon Canal Co.* and *First Trust & Sav. Bank v. Bitter Root Valley Irrig. Co.*, *supra*, n. 8, assumed normal yearly flow to be the limit, but the precise point was not involved.

order that lands now under irrigation may not suffer except in years of actual drought. How large a margin should be allowed for this purpose, is necessarily a matter of discretion. "It is a factor that must vary from locality to locality and from system to system. It is necessarily higher in extremely arid localities and in localities where the normal fluctuations in rainfall are high" ¹² Obviously it should be left primarily to the judgment of the distributing company. But in case of dispute, the Railroad Commission as an administrative board should have the final decision.¹³ This the court recognized in its decision. It reviewed the evidence merely to show that there was enough of it to support the finding.

P. S. M.

PUBLIC SERVICE CORPORATIONS: WHAT ARE PUBLIC UTILITIES?—DEDICATION TO PUBLIC USE.—During the past six months the Supreme Court of California has more clearly defined the enterprises which the state may regulate as public utilities. In a previous number of the CALIFORNIA LAW REVIEW¹ it was contended that "agencies become public utilities independent of a desire of the owners of such agencies and irrespective of any voluntary devotion to public use."² The note writer thought that it should be solely a matter of legislative determination, and called in question the California rule requiring a "dedication" of the properties of the agency to public use before it can be considered a public utility. What this doctrine involves, will more clearly appear from a brief discussion of the underlying bases of the modern regulation of public service corporations.

Fundamentally the modern concept of public utilities is drawn from that of the "common callings" in the early common law, which embraced all forms of business. Persons who gave the benefit of their services to their own family or to a few selected persons under special contract were not regarded as engaged in business, but in "private callings."³ To make an enterprise a "common calling," therefore, it was merely necessary to find a holding out to serve all who might desire the particular service—making a "public profession," as it has been called.⁴

With the coming of the laissez faire economic period, the concept of the common calling was lost from sight, except in the cases of the common carrier and the common innkeeper.⁵ But the develop-

¹² 61 Cal. Dec. 316, 323.

¹³ See Wyman on Public Service Corporations, § 1409. *Palermo Land & Water Co. v. R. R. Com.* (1916) 173 Cal. 380, 160 Pac. 228.

¹ 7 California Law Review, 127.

² *Supra*, n. 1, p. 129, quoting "Control of Public Utilities in California," by John M. Eshelman, 2 California Law Review, 104.

³ Edward A. Adler, *Business Jurisprudence*, 28 Harvard Law Review, 135, 149, et seq.

⁴ *Supra*, n. 3, p. 152. See also Wyman on Public Service Corporations, § 200, and 16 West Virginia Law Quarterly, 140, 145.

⁵ *Supra*, n. 3, p. 156, et seq.